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13 Attorneys for Defendant/Counter-Plaintiff,  
 14 KEATING DENTAL ARTS, INC.

15 IN THE UNITED STATES DISTRICT COURT  
 16 FOR THE CENTRAL DISTRICT OF CALIFORNIA  
 17 SOUTHERN DIVISION

18 JAMES R. GLIDEWELL DENTAL  
 19 CERAMICS, INC. dba GLIDEWELL  
 20 LABORATORIES,

21 Plaintiff,

22 v.

23 KEATING DENTAL ARTS, INC.

24 Defendant.

25 AND RELATED COUNTERCLAIMS.

) Civil Action No.  
 ) SACV11-01309-DOC(ANx)

) Honorable David O. Carter

) **DEFENDANT AND**  
 ) **COUNTER-PLAINTIFF**  
 ) **KEATING DENTAL ARTS,**  
 ) **INC.'S NOTICE OF MOTION**  
 ) **AND MOTION IN LIMINE**  
 ) **TO EXCLUDE TESTIMONY**  
 ) **OF SEVEN DENTISTS**  
 ) **(MOTION IN LIMINE NO. 4)**

) Trial Date: February 26, 2013

) Time: 8:30 a.m.

) Location: Courtroom 9D  
 )  
 )  
 )

1 TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

2 PLEASE TAKE NOTICE THAT on February 26, 2013, at 8:30 a.m., or as  
3 soon thereafter as the matter may be heard by the Honorable David O. Carter of the  
4 United States District Court for the Central District of California, Southern  
5 Division, at 411 West Fourth Street, Courtroom 9D, Santa Ana, CA, 92701,  
6 Defendant and Counter-Plaintiff Keating Dental Arts, Inc. ("Keating" or  
7 "Defendant") will move and hereby does move for an order excluding from trial the  
8 declarations and testimony of Drs. Gregory Doneff, Stuart R. Newman, Howard S.  
9 Cohen, Spencer D. Luke, Thomas E. Bell, Kent Toca, and Terence J. Michiels  
10 (collectively "Seven Dentists"). Plaintiff and Counter-Defendant James R.  
11 Glidewell Dental Ceramics, Inc. ("Glidewell") first noticed the Seven Dentists as  
12 witnesses twelve minutes before midnight on October 29, 2012, the discovery  
13 cutoff date. Accordingly, Glidewell's notice was untimely and the trial testimony of  
14 the Seven Dentists should be excluded pursuant to Federal Rule of Civil Procedure  
15 ("F.R.C.P.") 37(c)(1). Furthermore, the offered testimony of the Seven Dentists is  
16 of low probative value because the Seven Dentists are customers of Glidewell  
17 selected by Glidewell on short notice (upon the appearance of Glidewell's new  
18 litigation counsel) to provide testimony in this case. Thus, the low probative value  
19 of the Seven Dentists' testimony is outweighed by the unfair prejudice to Keating  
20 as a result of the untimely disclosure. Accordingly, the proposed testimony of the  
21 Seven Dentists, and any argument relating thereto, should also be excluded  
22 pursuant to Federal Rule of Evidence ("F.R.E.") 403.

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1 This motion is based upon this Notice, the accompanying Memorandum of  
2 Points and Authorities, all pleadings, papers, and records on file in this action, all  
3 matters of which the Court may take judicial notice, and such further written and  
4 oral argument as may be presented to the Court.

5 Respectfully submitted,

6 KNOBBE, MARTENS, OLSON & BEAR, LLP

7  
8 Dated: January 17, 2013

By: /s/ David G. Jankowski

Darrell L. Olson

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Jeffrey L. Van Hoosear

David G. Jankowski

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14 KEATING DENTAL ARTS, INC.  
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## **MEMORANDUM OF POINTS AND AUTHORITIES**

### **I. INTRODUCTION**

Defendant and Counter-Plaintiff Keating Dental Arts, Inc. (“Keating” or “Defendant”) hereby moves for an order *in limine* to exclude from trial any testimony from:

Dr. Gregory Doneff;

Dr. Stuart R. Newman;

Dr. Howard S. Cohen;

Dr. Spencer D. Luke;

Dr. Thomas E. Bell;

Dr. Kent Toca; and

Dr. Terence J. Michiels (collectively “Seven Dentists”).

Plaintiff and Counter-Defendant James R. Glidewell Dental Ceramics, Inc. (“Glidewell”) first notified Keating of the Seven Dentists as trial witnesses twelve minutes before midnight on October 29, 2012, the discovery cutoff date. Accordingly, all trial testimony from the Seven Dentists should be excluded pursuant to F.R.C.P. 37(c)(1).

Furthermore, the proposed testimony of the Seven Dentists is of low probative value because the Seven Dentists are customers of Glidewell. The low probative value of the Seven Dentists’ testimony is outweighed by the unfair prejudice to Keating as a result of the untimely disclosure. Accordingly, the testimony of the Seven Dentists’ should also be excluded pursuant to F.R.E. 403.

### **II. RELEVANT BACKGROUND**

As stated in the Court’s Scheduling Order (Docket No. 15), the discovery cutoff date was October 29, 2012. Glidewell served its Initial Disclosures Under F.R.C.P. 26(a)(1)(A) on December 5, 2011.

However, on the discovery cut-off date, October 29, 2012, at 11:48 p.m., Glidewell’s counsel sent an email to Keating’s counsel (Docket No. 125-9),

1 attaching Glidewell's First Amended Initial Disclosures Under F.R.C.P.  
2 26(a)(1)(A). In Glidewell's First Amended Initial Disclosures, Glidewell named  
3 the Seven Dentists as witnesses for the first time.

4 On October 29, 2012, Glidewell also filed an *Ex Parte* Application to Amend  
5 Scheduling Order to extend discovery deadlines. (Docket No. 69.) However, the  
6 Court denied Glidewell's *Ex Parte* Application to Amend Scheduling Order on  
7 November 9, 2012 and refused to extend the discovery or expert disclosure  
8 deadlines. (Docket No. 74.)

9 Nevertheless, on November 19, 2012, Glidewell filed substantially similar  
10 declarations for each of the Seven Dentists in support of Glidewell's motions for  
11 summary judgment. (Docket No. 90-1, Exhibits A-F, Q.) These declarations  
12 revealed the Seven Dentists were customers of Glidewell. (*Id.*)

13 **III. GLIDEWELL'S NOTIFICATION THAT IT INTENDED TO CALL**  
14 **THE SEVEN DENTISTS AS TRIAL WITNESSES WAS UNTIMELY AND**  
15 **THE TESTIMONY OF SEVEN DENTISTS SHOULD BE EXCLUDED**  
16 **PURSUANT TO F.R.C.P 37(C)(1)**

17 Under F.R.C.P. 26(a)(1) (A), a party must disclose to the other parties the  
18 identity of each individual likely to have discoverable information, along with the  
19 subjects of that information. A party must make the initial disclosures at or within  
20 14 days after the parties Rule 26(f) conference. Fed. R. Civ. P. 26(a)(1)(C).  
21 Moreover, a party "is not excused from making its disclosures because it has not  
22 fully investigated the case." Fed. R. Civ. P. 26(a)(1)(E). "If a party fails to provide  
23 information or identify a witness as required by Rule 26(a) or (e), the party is not  
24 allowed to use that information or witness to supply evidence on a motion, at a  
25 hearing, or at a trial, unless the failure was substantially justified or is harmless."  
26 Fed. R. Civ. P. 37(c)(1).

27 Here, Glidewell violated F.R.C.P. 26(a)(1) by failing to timely disclose the  
28 Seven Dentists in either its Initial Disclosures or written discovery responses. The

1 first time Glidewell identified the Seven Dentists was in the Amended Initial  
2 Disclosures, e-mailed to Keating's counsel twelve minutes before midnight on  
3 October 29, 2012, the discovery cutoff date. Fed. R. Civ. P. 26(a)(1)(C). In other  
4 words, these Amended Initial Disclosures were served *eleven months after* the Joint  
5 26(f) Report filed on November 28, 2011. (Docket No. 11.)

6 Due to Glidewell's untimely disclosure, Keating did not have the opportunity  
7 to depose any one of the Seven Dentists. Thus, Keating never had the opportunity  
8 to question the Seven Dentists regarding the declarations they signed in support of  
9 Glidewell's summary judgment motions. Accordingly, pursuant to F.R.C.P.  
10 37(c)(1), the testimony of the Seven Dentists must be excluded from trial unless  
11 Glidewell can show a "substantial justification" for its violation of F.R.C.P.  
12 26(a)(1), or show that its violation was harmless. *Yeti by Molly Ltd. v. Deckers*  
13 *Outdoor Corp.*, 259 F.3d 1101, 1106 (9th Cir. 2001).

14 Glidewell has not offered any sufficient justification for its failure to timely  
15 disclose the Seven Dentists. The only explanation given by Glidewell in its *Ex*  
16 *Parte* Application (which the court denied) was that Glidewell's prior counsel had  
17 not been diligent. (Docket No. 69, page 1.) Lack of diligence is not an excuse for  
18 ignoring the court's scheduling orders. Fed. R. Civ. P. 26(a)(1)(E) ("a party is not  
19 excused from making its disclosures because it has not fully investigated the case");  
20 *Wong v. Regents of the Univ. of Cal.*, 410 F.3d 1052, 1062 (9th Cir. 2005).  
21 Furthermore, as noted above, the prejudice to Keating increased significantly  
22 because Keating did not have the opportunity to depose any of the Seven Dentists.  
23 In light of this increased prejudice, the burden on Glidewell of showing a  
24 "substantial justification" should also be increased.

25 In order for the testimony of the Seven Dentists to be admitted at trial, the  
26 Court would have to reopen discovery to permit Keating to depose the Seven  
27 Dentists. However, the Court expressly denied Glidewell's request for such  
28 extensions, and rightfully so. (Docket No. 74.) Accordingly, any evidence or

1 argument relating to, or introduced by, the Seven Dentists should be excluded at  
 2 trial pursuant to F.R.C.P. 37(c)(1).

3 **IV. THE TRIAL TESTIMONY OF THE SEVEN DENTISTS IS NOT**  
 4 **PROBATIVE AND SHOULD BE EXCLUDED PURSUANT TO F.R.E. 403**

5 “The court may exclude relevant evidence if its probative value is  
 6 substantially outweighed by a danger of one or more of the following: unfair  
 7 prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or  
 8 needlessly presenting cumulative evidence.” F.R.E. 403.

9 “Evidence of secondary meaning from a partial source possesses very limited  
 10 probative value.” *Filipino Yellow Pages, Inc. v. Asian Journal Publs., Inc.*, 198  
 11 F.3d 1143, 1151-1152 (9th Cir. 1999) (citing *Norm Thompson Outfitters*, 448 F.2d  
 12 1293, 1297 (9th Cir. 1971) (finding that testimony from persons closely associated  
 13 with the plaintiff as to secondary meaning of mark does not adequately reflect the  
 14 view of the buying public); *see also Self-Realization Fellowship Church v. Ananda*  
 15 *Church of Self-Realization*, 59 F.3d 902, 910 (9th Cir. 1995) (declarations from a  
 16 trademark plaintiff’s employees and wholesalers had “little probative value  
 17 regarding the assessment of consumer perception” because “[t]rademark law is  
 18 skeptical of the ability of an associate of a trademark holder to transcend personal  
 19 biases to give an impartial account of the value of the holder’s mark”).

20 Here, the Seven Dentists are customers of Glidewell. (Docket No. 90-1,  
 21 Exhibits A-F, Q.) Thus, any testimony they could provide regarding the public  
 22 perception of Glidewell’s mark is impartial and of limited probative value. In light  
 23 of the untimely disclosure of the Seven Dentists as witnesses, and Keating’s lack of  
 24 opportunity to depose the Seven Dentists and to prepare Keating’s defense  
 25 accordingly, the limited probative value of the Seven Dentists’ testimony is  
 26 outweighed by the prejudice to Keating. Accordingly, the testimony of the Seven  
 27 Dentists should be excluded from trial pursuant to F.R.E. 403.

28 ///

**V. CONCLUSION**

For the foregoing reasons, the Court should exclude from trial all declarations and testimony by Drs. Gregory Doneff, Stuart R. Newman, Howard S. Cohen, Spencer D. Luke, Thomas E. Bell, Kent Toca, and Terence J. Michiels, and any argument relating thereto.

Respectfully submitted,

KNOBBE, MARTENS, OLSON & BEAR, LLP

Dated: January 17, 2013

By: /s/ David G. Jankowski

Darrell L. Olson

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